The Macdonald Will Case

By

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WALLINGFORD PRESS

FOREWORD

Just a word as to the necessity for the publication of this pamphlet. Two weeks ago today, on the 24th ult., I delivered my final, reasoned, written Judgment in "THE MACDONALD WILL CASE." The case is one of the most important in the history of the Province; and, perhaps, no previous JUDGMENT in our courts ever so vitally affected the public interests. Yet the JUDGMENT has been practically suppressed in the public press, ostensibly from fear or through threat of libel action.

Mr. S. J. Farmer, M.L.A., with his usual public spirit, interested himself in this matter. He read my JUDGMENT, or such portions of it as he was allowed to read, on the floor of the Legislature. Yet the press only reported the fact that the JUDGMENT was read, without reporting the nature and substance of the JUDGMENT itself, as to which the public is still in ignorance.

So much for our boasted, vaunted FREEDOM OF SPEECH and LIBERTY OF THE PRESS! And hence the necessity for the publication of this pamphlet, to give the people information they are entitled to have, withdrawn and withheld from them at the dictation of P R I V I L E G E.

The late Alexander Macdonald always intended, in fact, the evidence shows it was an "obsession" with him, to constitute "THE MACDONALD TRUST" out of his residuary estate, at least ONE MILLION AND A HALF DOLLARS. He died still declaring that trust, as the evidence of John Alexander Forlong and his wife, Grace Anne Forlong, abundantly and conclusively shows, and they are estopped and bound by that evidence. No word of their evidence shows any instructions for a WILL such as the infamous document Exhibit 1 in the case. Every word of their evidence constitutes them TRUSTEES and not beneficiaries. One sample will suffice from the evidence of John Alexander Forlong:

By MR. PHILLIPPS—Page 574:

"Q.—In his interests?
A.—Well, in his interests, or—
Q.—That is what you said?
A.—Do the best we could.
Q.—And you would regard that as a SACRED TRUST, wouldn't you?
A.—Yes.
Q.—AND YOU REGARDED WHAT THE OLD GENTLEMAN TOLD YOU AS A SACRED TRUST TO CARRY ON IN HIS INTERESTS?
A.—DO THE BEST.
Q.—IN HIS INTERESTS?
A.—WELL, IN HIS INTERESTS, YES.

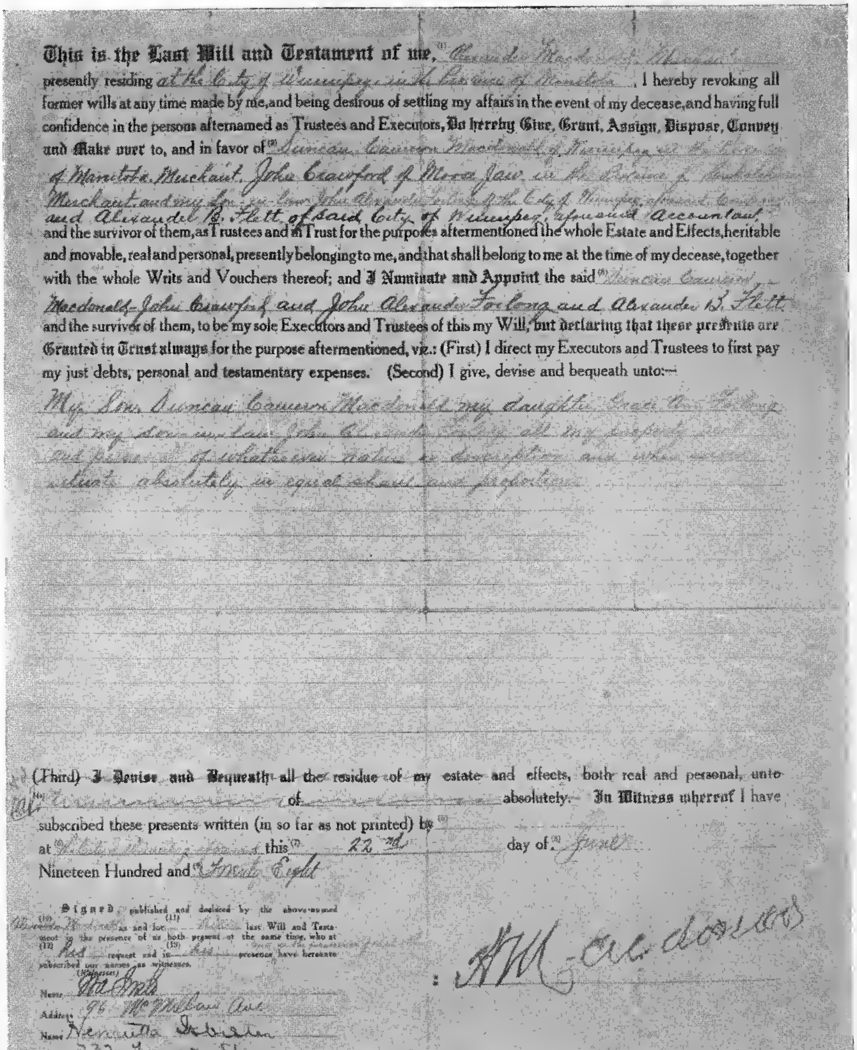
The issue in this matter is whether or not the charitable institutions of Winnipeg shall get what Mr. Macdonald intended them to have: An annual income of approximately SEVENTY-FIVE THOUSAND DOLLARS in perpetuity.

"EQUITY CONSIDERS THAT DONE WHICH OUGHT TO BE DONE." The situation calls for the practical application of that sound fundamental principle of equity jurisdiction. The LEGISLATURE is the only body with the supreme authority and jurisdiction to now remedy the situation. In my humble opinion, it should act on the recommendation in my JUDGMENT and DO IT.

I take full responsibility for the authorship and publication of this pamphlet. It is an introduction to a more extended history of this amazing case which I shall later write and publish, and which will be illustrated and authenticated by the documents, correspondence and evidence of the case.

L. ST. G. STUBBS,
Surrogate Court Judge.

Law Courts, Winnipeg, Manitoba.
8th February, 1930.



This is the Last Will and Testament of me, [illegible] presently residing at the City of Winnipeg in the Province of Manitoba, I hereby revoking all former wills at any time made by me, and being desirous of settling my affairs in the event of my decease, and having full confidence in the persons afternamed as Trustees and Executors, **Do hereby Give, Grant, Assign, Dispose, Convey and Make over** to, and in favor of Duncan Cameron Macdonald of Winnipeg in the Province of Manitoba Merchant, John Crawford of Moose Jaw in the Province of [illegible] Merchant and my Son-in-law John Alexander Forlong of the City of Winnipeg [illegible] and Alexander B. Flett of said City of Winnipeg aforesaid Accountant, and the survivor of them, as Trustees and in Trust for the purposes aftermentioned the whole Estate and Effects, heritable and movable, real and personal, presently belonging to me, and that shall belong to me at the time of my decease, together with the whole Writs and Vouchers thereof; and **I Nominate and Appoint** the said Duncan Cameron Macdonald, John Crawford and John Alexander Forlong and Alexander B. Flett and the survivor of them, to be my sole Executors and Trustees of this my Will, **but declaring that these presents are Granted in Trust always** for the purpose aftermentioned, viz.: (First) I direct my Executors and Trustees to first pay my just debts, personal and testamentary expenses. (Second) I give, devise and bequeath unto:—

My Son Duncan Cameron Macdonald my daughter [illegible] and my son-in-law John Alexander Forlong all my property real and personal of whatsoever nature or description and wherever situate absolutely in equal shares and proportion.

(Third) **I Devise and Bequeath** all the residue of my estate and effects, both real and personal, unto [illegible] of [illegible] absolutely. **In Witness whereof** I have subscribed these presents written (in so far as not printed) by [illegible] at [illegible] this 22nd day of June Nineteen Hundred and Twenty Eight

Signed, published and declared by the above-named [illegible] as and for [illegible] last Will and Testament in the presence of us both present at the same time, who at [illegible] request and in [illegible] presence have hereunto subscribed our names as witnesses.

[illegible] Macdonald

Name [illegible]
Address 96 McMillan Ave
Name [illegible]
Address 737 [illegible] St.

EXHIBIT 1—*Facsimile of alleged will, probate of which was granted in common form on false proofs. Judge revoked probates and ordered the alleged will to be propounded for proof in solemn form. He also directed an inquiry into all matters and causes testamentary in relation to the estate.*

Chronology

IN RE ALEXANDER MACDONALD ESTATE

1929—

Feb. 26—Probate of alleged will granted in common form to John Crawford, John Alexander Forlong and Alexander B. Flett, executors therein named.

Mar. 1—Order made revoking probate and ordering alleged will to be propounded for proof in solemn form.

Mar. 16—Notice of appeal against revocation of probate and praecipe on appeal filed in Court and served on Judge.

Mar. 21—Notice of appointment for hearing of appeal on 26th inst. served on Judge.

Mar. 21—Appeal Book served on Judge.

Mar. 21—Judge requests intervention of King's Proctor in public interests and Chief Justice Perdue orders him to appear on hearing of appeal.

Mar. 22—Reasons for order revoking probate and requiring proof of alleged will in solemn form filed in Court of Appeal by Judge on request of Court of Appeal, and also furnished King's Proctor.

N. B. Compare and contrast the action of the Court of Appeal in asking the Judge for his reasons for revocation of probate with its arbitrary adjudication of adminstration to Grace Anne Forlong on the 22nd of January, 1930, without knowing the Judge's reasons for refusing administration. In one case the Judge's rights were respected; in the other they were ruthlessly disregarded, in circumstances which would put any open, unprejudiced, prudent mind upon guard and inquiry.

Mar. 26—Appeal heard. In response to questions from Court of Appeal, King's Proctor states in Court that Henrietta Isbister, one of the witnesses to alleged will, had admitted to him that she was not present at its execution. Court of Appeal ordered will to be propounded for proof in solemn form in Surrogate Court as ordered by Judge.

Mar. 27—Letter to Judge from Deputy Attorney-General (King's Proctor) stating that Mr. Hoskin, (counsel for the executors), had conferred with him that morning and asked him "to hold up matters so that he could look into certain features which may make it unnecessary for Mr. Laidlaw and myself to appear further in this matter."

Mar. 27—Letter in reply from Judge to Deputy Attorney-General stating that his "order of the first instant stands, both

in respect of the revocation of the probate, and in respect to the requirement of the proof of the alleged will in solemn form. All the facts and circumstances of this case call for and demand a judicial investigation and disposition and nothing less will suffice." This has been the attitude of the Judge from first to last.

Mar. 28—Attempt by Mr. A. E. Hoskin, K. C., and Mr. A. C. Ferguson, K. C., to get special grant of administration in favour of Grace Anne Forlong from the Court of Appeal through Chief Justice Perdue.

Apr. 2—Letter from Judge to Deputy Attorney-General informing him of attempt to get special grant of administration; stating that judicial inquiry must proceed, and asking whether his "Court is to have the assistance of the proper Crown officials in that behalf in this matter, or not."

Apr. 3—Letter in reply from the Deputy Attorney-General to the Judge stating that as Mr. Hoskin admitted will could not be proved in solemn form unnecessary to make motion to prove in solemn form; that now duty of Macdonald estate to move and not duty of Department; that Department prepared to function and assist in any way consistent with duty in such matters. Letter closed, as follows: "When the matter comes before you again, will you kindly advise us if the services of this office are required?"

Apr. 3—Application for administration filed by Grace Anne Forlong. Proofs incomplete and no bond.

Conversations proceeded during month of April between Judge and Department of Attorney-General relative to counsel to appear in proceedings before him. The Judge insisted upon an outstanding counsel of equal calibre with his opponents being appointed, but Department refused and finally assigned Mr. G. L. Cousley, one of its own assistants, to act in the matter.

May 3—Formal order and summons taken out by Mr. Cousley citing parties to appear on 13th May at 10:30 a.m. on the hearing of the proof of the alleged will in solemn form and on the inquiry in respect of matters or causes testamentary with regard to Alexander Macdonald, deceased.

May 13—Proceedings opened and continued on various dates until closed on 12th June.

May 14—Judge appointed Mr. Hugh Phillipps, K.C., to assist Court and represent charitable institutions as a class.

June 12—Court delivered interim oral judgment.

June 28—Judge notified solicitor for estate administration would not be granted to Grace Anne Forlong, but offered to grant temporary and conditional administration to any reputable trust company in order to have a properly

constituted legal representative to act for estate. This interview took place on the initiative of the Judge who sent for Mr. Ferguson to tell him what he was prepared to do. The conditions were that the trust company should administer the estate, but must conserve the assets intact, although their form could be changed, if necessary, until the Legislature had had an opportunity to deal with the Judge's recommendation at its next session. Offer rejected and grant of administration to Grace Anne Forlong insisted upon. This attitude of the Judge and the solicitors for the estate respectively maintained and persisted in throughout.

July 2—Further material filed on application for administration, accompanied by letter from solicitors for estate, dated 28th June, 1929. No bond filed.

Sept. 30—Bond of Canadian Surety Company in favour of Judge for Four Million Dollars filed in Court. Bond partly printed, partly typewritten, contrary to rules of Court. No oath of justification of surety accompanied bond.

Oct. 2—Judge again notified solicitor for estate that administration to Grace Anne Forlong refused and renewed offer to appoint trust company temporarily and conditionally. Judge threatened with mandamus proceedings.
N. B. Statement of Mr. A. C. Ferguson in his affidavit referring to this interview, subsequently used on mandamus proceedings, in the following words: "It was then agreed between us that if I did not hear from him by October 5th, 1929, I could assume that everything was in order," contrary to fact. No such agreement made between the Judge and Mr. Ferguson. The whole course of conduct of the Judge in connection with the estate refutes the proposition. The Judge knew his business better than to ever agree to accept a defective bond grossly inadequate and insufficient for the purposes for which given, particularly in the infamous circumstances disclosed in connection with this estate, requiring the utmost security.

Oct. 12—Bond withdrawn from Court by solicitor of estate with consent of Judge to change from typewriting to handwriting, because not complying with rules of Court.

Oct. 14—Bond refiled, partly printed, partly handwritten, to accord with rules of Court. Bond accompanied by letter from solicitors for estate, dated 14th October and date of filing stamped on bond.

Oct. 15—Judge served with written notice that unless administration granted to Grace Anne Forlong on or before following Monday (21st) mandamus proceedings would be immediately taken thereafter to enforce issue of grant to her.

Nov. 3—Notice of motion for order of mandamus with accompanying material served on Judge and Clerk of the Surrogate Court and the Court itself.

Dec. 4—Motion for order of mandamus heard by Mr. Justice Donovan. Mr. H. A. Bergman, K. C., representing the Judge of the Surrogate Court and the Court itself filed no material, and, under instructions from the Judge, opposed proceedings on jurisdictional and legal grounds only. The Judge refused to attorn to the jurisdiction of the Court in the motion before it.

Dec. 9—Order of mandamus made by Mr. Justice Donovan ordering the Judge and the Clerk of the Surrogate Court to grant letters of administration to Grace Anne Forlong within eight days after service of the order upon them. Further ordered that no costs be allowed.

Dec. 16—Notice of appeal against order of mandamus and praecipe on appeal filed in Court of Appeal by Mr. H. A. Bergman, K.C., on behalf of the Surrogate Court and the Judge thereof.

Dec. 19.—Appeal heard by Court of Appeal. Judgment reserved.

1930—

Jan. 13—Court of Appeal set aside order of Mr. Justice Donovan and made order directing the Judge of the Surrogate Court to forthwith proceed to hear and determine the application of Grace Anne Forlong for administration. The "Court did not see fit to make any order as to costs." Judgment reported in "Western Weekly Reports."

N. B. The Judge had determined the application of Grace Anne Forlong for administration as far back as June, 1929. As a result of the evidence in the proceedings before him he had adjudged that he would not grant administration to her and had so notified the solicitor for the estate, and because of that fact mandamus procedure was never legally available to the applicant, and her only remedy was by way of appeal, which remedy she had allowed to lapse. (See Court of Appeal judgment.)

Jan. 16—Order of Court of Appeal served on Judge.

Jan. 17—Mr. A. C. Ferguson, K. C., solicitor for estate, interviewed Judge. Judge notified him that now mandamus proceedings were over he would proceed to complete his formal, reasoned, written judgment on the whole proceedings before him, which would be delivered in a few days and not later than one week from that date. Judge again refused to grant administration. He informed Mr. Ferguson that in no case could any judge be expected to accept as sufficient the bond filed for Four Million Dollars from a company with assets over liabilities of less than a Half Million Dollars.

N. B. The imminence of the final judgment, the nature of which had been foreshadowed in the interim judgment and the conclusions of which could be forecast with reasonable certainty, and the insuperable difficulty of getting a proper, substantial bond in the infamous circumstances of the case, explain and account for the character and precipitancy of the ex parte application to the Court of Appeal for administration a few days later.

Jan. 18—Judge formally recorded refusal to grant administration to Grace Anne Forlong—a refusal first made and persisted in since June, 1929.

Jan. 20—Notice of appeal against refusal to grant administration filed in Surrogate Court, but not served on Judge.

Jan. 22—Court of Appeal on an Ex Parte Motion, heard by special leave of the Court, without any notice to the Judge of the Surrogate Court and without any request to him for the grounds of his refusal to grant administration; without notice to the parties appearing in the proceedings before the Judge; without any evidence before it; without the record of the proceedings before the Judge comprising nearly one thousand pages; without even considering the application for administration and accompanying proofs; without the bond before it, and with no consideration as to its sufficiency; in a session lasting only a few minutes with the order previously prepared by the solicitors and ready for execution, ordered and adjudged that letters of administration be granted to Grace Anne Forlong, and ordered and directed the Clerk of the Surrogate Court to forthwith issue, sign, seal and deliver them to her.

Jan. 24—Final Judgment on the whole proceedings before him delivered by the Judge of the Surrogate Court.

Jan. 24—Judge supplied copies of his judgment to representatives of the Press at their request.

Jan. 25—Judgment practically suppressed in public press from fear or through threat of libel action.

Jan. 27—Judge interviewed Chief Justice Prendergast. Made vigorous protest against action of Court of Appeal. Informed the Chief Justice that if some means not found to revoke the grant of administration by Wednesday, the 29th January, he would carry his appeal to the FINAL COURT of PUBLIC OPINION, regardless of consequences, and at the cost of the sacrifice of his office, if need be.

N.B.—It took just two days from the filing of the notice of appeal against the last refusal to grant administration, Monday to Wednesday, for the solicitors for the estate to get the grant of administration in the EXTRAORDINARY manner above stated.

IN THE SURROGATE COURT OF THE EASTERN JUDICIAL DISTRICT OF THE PROVINCE OF MANITOBA

IN THE MATTER OF THE ESTATE OF

Alexander Macdonald

DECEASED

INTERIM (ORAL) JUDGMENT

REASONS FOR FINAL (WRITTEN) JUDGMENT

In the Surrogate Court of the Eastern Judicial District of the Province of Manitoba

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Before His Honor Judge L. St. G. Stubbs

In the matter of the Will of Alexander Macdonald, deceased, late of the City of Winnipeg in the Province of Manitoba, Merchant, ordered to be propounded for Proof in Solemn Form, and in the Matter of an Inquiry ordered in respect of matters or causes testamentary in the Estate of the said Alexander Macdonald, deceased.

Mr. A. E. Hoskin, K.C. and Mr. E. G. P. Baker for John Crawford, John Alexander Forlong, and Alexander B. Flett, Executors, and Grace Anne Forlong, Beneficiary.

Mr. G. L. Cousley for the King's Proctor and the Attorney General for Manitoba.

Mr. B. V. Richardson for H. H. Cooper et al.

Mr. Hugh Phillipps, K.C., appointed by the Court to assist the Court and to represent Charitable Institutions.

In re Alexander Macdonald Estate

Interim (Oral) Judgment

At this time I shall only indicate briefly certain general conclusions I have formed. I shall later hand down a written, reasoned, formal judgment, but my mind has formed certain very definite conclusions and I see no reason why I should not intimate them now. First, with regard to the alleged Will of the 22nd June, 1928, the circumstances surrounding that document are most unusual, most extraordinary, not at all what we should expect to find. The circumstances connected with its preparation, its execution, the proofs of its execution show unmistakable signs of stealth, deception, falsity and fraud. Nothing appears to be straightforward, open and above-board; everything seems to be devious and underhand. I shall elaborate and deal with these characteristics with particularity in my written judgment.

The proponents of this alleged Will have withdrawn the application to probate it on the ground that it was irregularly executed; but, in my opinion, it is not only irregular, invalid, for informality of execution, but it is void, absolutely void, for want of testamentary capacity in the testator.

The late Mr. Macdonald was in his 84th year and in his recent years suffered from a progressive senility of the mind. As to just what time he can be said to have lost testamentary capacity it is difficult, if not impossible, to determine. I am absolutely satisfied in my mind, however, that at no time during his last illness which the doctor placed from the end of May to his death did he have

testamentary capacity. During that period I am satisfied he had no business capacity, no contractual capacity, no testamentary capacity, in the legal sense of those terms.

Now, the highlight of this Inquiry, the noonday fact which stands out clearly, is that Mr. Macdonald, having made reasonable, ample and generous provision for his family in his lifetime, always intended to devote the bulk of his estate after his death to charitable purposes in and through what he called "The Macdonald Trust." It is said and it has been attempted to prove that he changed his mind towards the end of his life and abandoned his charitable intentions. In my opinion that is not so. It is not correct to say he changed his mind; it is correct to say his mind changed. His mind changed through the processes of senile decay until it was so weakened and so enfeebled that he had not, as I have already said, testamentary capacity. He had not that sound mind, memory and understanding, the necessary qualifications of testamentary capacity.

If this Court were able, it would unhesitatingly admit to probate the Will of the 26th of December, 1923, signed by Mr. Macdonald in the presence of one witness only, but the Wills Act steps in and prevents that being done. There is no question that prior to the passage of the Wills Act, that document would have been given probate by the Courts then dealing with such matters.

Counsel has suggested that the special and very exceptional circumstances of this case warrant and would justify resort being had to the only authority in this Province that could validate the 1923 Will, viz., the Legislature. That, of course, is a very unusual step to take at any time. Our Legislature has on a number of occasions dealt with Wills, construed Wills, conferred special powers upon executors and administrators and so on, and on one occasion has actually regularized and validated a Will irregular and invalid for the same reason as the 1923 Will of Mr. Macdonald.

In my view the essential, the eternal justice of the case requires that that be done again, justice not only to Mr. Macdonald himself, but justice to those objects of his bounty which he always intended to benefit, an intention which he held so firmly, so steadfastly, so persistently, as to have been described by several of the witnesses as an "obsession" with him. He held that intention I am absolutely satisfied and convinced, as long as his mind functioned normally and properly, and justice requires that it be effectuated if at all possible. I shall in my formal judgment act upon the suggestion of counsel and make such recommendation to the Legislature of this Province.

I wish to thank all Counsel who have appeared before me in this matter, and without being invidious I particularly wish to thank Mr. Phillipps for the very able and very thorough manner in which he has performed the duties which the Court requested him to undertake.

(Sgd.) L. ST. G. STUBBS,
Surrogate Court Judge.

Dated this 12th day of June, 1929.

REASONS FOR FINAL JUDGMENT

On the 12th June last on the conclusion of the hearing of this matter, I gave an interim oral judgment in which I indicated certain general conclusions I had formed and in which I stated that I would later hand down a written, reasoned, formal judgment. Since then there have been some amazing developments in the case and some novel and most extraordinary practice and procedure sought to be adopted and established.

These proceedings were instituted following the cancellation of the probate granted by this court in common form of the alleged will of the said deceased, dated the 22nd day of June, 1928, after an unsuccessful appeal to the Court of Appeal against such cancellation. This court ordered the said will to be propounded for proof in solemn form and directed an inquiry in respect of matters or causes testamentary with regard to the said Alexander Macdonald, deceased. On the opening of the proceedings counsel for the executors named in the said alleged will admitted its invalidity and formally withdrew the application for probate thereof. The court, however, considered the circumstances required and demanded a thorough investigation into the testacy or intestacy of the deceased and proceeded with the inquiry.

Counsel for the executors named in the said alleged will and for Mrs. Forlong objected that this court had no authority or jurisdiction to pursue such inquiry and submitted that its action in doing so was ultra vires of its powers. Apart from the inherent necessity of the court possessing such powers to function properly, to do justice and to prevent fraud and injustice, particularly in the special and important field of jurisdiction of this court, Section 52 of "The Surrogate Courts Act" and several other enabling sections specifically confer such powers.

Section 52 of the Act is as follows:

"52. Every Surrogate Court may require the attendance of any party in person, or of any person whom it may think fit to examine or cause to be examined in any suit or other proceedings in respect of matters or causes testamentary, and may examine or cause to be examined upon oath, as the case may require, parties and witnesses by word of mouth, and may, either before or after, or with or without, such examination, cause them or any of them to be examined on interrogatories, or receive their or any of their affidavits, as the case may be; and each of the said courts may by writ of subpoena or subpoena duces tecum, as the case may be, require such attendance and order any deeds, evidences or writing to be produced before itself or otherwises.—R.S.M. c. 41, s. 54."

By Section 2, Sub-section (c) of the Act, "the expression 'matters and causes testamentary' means and includes all matters and causes relating to the grant and revocation of probate of wills or letters of administration."

In the meantime during the pendency of these proceedings, an application for administration of the said estate was filed by Grace Anne Forlong, as sole heiress-at-law of the said deceased.

This the court in the exercise of its discretion refused to grant; but offered to give a limited and conditional administration of the estate to a trust company so that any matters of urgency requiring attention could be dealt with by a properly constituted legal representative, but the offer was rejected.

I postponed further consideration of this matter until after the long legal vacation, intending then to complete my judgment. After vacation the application of Mrs. Forlong for administration was renewed and again refused. I was then served with a written demand to grant administration to her within a stated period, failing which an application would be made to the Court of King's Bench for an order of mandamus to compel me to do so.

In due course, mandamus proceedings were instituted and culminated in Mr. Justice Donovan, on the 9th ultimo, issuing an order as follows:

"This Court doth peremptorily order that the Judge of the Surrogate Court of the Eastern Judicial District of the Province of Manitoba and the Surrogate Court Clerk for such Court do within eight days after the service upon them of a copy of this Order grant Letters of Administration to the said Grace Anne Forlong to the estate and effects of the said Alexander Macdonald, deceased."

An appeal was taken to the Court of Appeal from Mr. Justice Donovan's order on two grounds: first, that the Surrogate Court is not subject to mandamus; and secondly, that, if it is so subject, no other judicial authority can order any particular disposition of any matter before it for judicial determination and decision. The first of these contentions is controversial; the second is trite law.

In Halsbury's Laws of England, Vol. 10, Sec. 188, the law is stated thus:

"In cases where application is made for the issue of a writ of mandamus to tribunals of a judicial character, the writ will only be allowed to go commanding such tribunals to hear and decide a particular matter. No writ will be issued dictating to them in what manner they are to decide."

In Allcroft vs. London (Bishop), (1891) A.C. 666, Lord Halsbury, L.C., says at page 675:

"To justify any writ of mandamus, it must be made to appear that the bishop had not exercised the jurisdiction which the statute vested in him. Your lordships have nothing to do with the question whether his judgment is right or wrong."

And per Lord Herschell in the same case, at page 680:

"When the statute prescribes that the bishop's opinion is to be formed after considering the whole of the circumstances of the case, I think it must mean that the bishop is to consider all the circumstances which appear to him, honestly exercising his judgment, to bear upon the particular case. I dissent entirely from the view that it is for the courts or your lordships to determine what are the considerations which ought to govern the bishop's opinion."

And so it would appear that the judge of the Surrogate Court has as much right to be wrong as Mr. Justice Donovan or any

other judge has. And Section 92 of "The Surrogate Courts Act" provides the remedy for those who think he is wrong, as follows:

"Any person considering himself aggrieved by any order, sentence or judgment of a Surrogate Court, or being dissatisfied with the determination of the judge thereof in point of law in any matter or cause under this Act, may, within fifteen days after such order, sentence, judgment or determination, appeal therefrom to the Court of Appeal . . ."

The order of Mr. Justice Donovan was an unjustified dictation of judgment by one judge to another, an unwarranted interference by one court in another, aggravated by the fact that it was in a sphere of co-ordinate and concurrent jurisdiction. It was a violation of the fundamental principle of the independence of judgment of a judge. It took a long, hard struggle to establish that principle in the British Constitution, and it is the crowning virtue of the British judicial system. Take away that right of absolute independence of judgment from a judge, deny to him its exercise, subject him to outside dictation in forming his judgment, and he is no longer a judge, but a tool, a mere rubber-stamp.

Mr. Justice Donovan made his mandamus order without knowing the facts of the case, not knowing the reasons and considerations upon which I acted. The proceedings before me lasted for some nine or ten days and the record comprises nearly one thousand pages, nothing of which was before him, and not before him because it was not his concern. He has no right to review my discretion and revise my judgment. And yet he assumed to exercise my discretion and to dictate my judgment. He "inferred" that the applicant was entitled to a grant of administration because nothing was shown him to the contrary. He was not shown to the contrary because the matter was not one for him to decide, and counsel on behalf of this court opposed the mandamus proceedings on purely jurisdictional and legal grounds.

The Court of Appeal, by order dated the 13th inst., varied the order of Mr. Justice Donovan by substituting the following therefor:

"This Court doth peremptorily order and direct that the Judge of the Surrogate Court of the Eastern Judicial District of the Province of Manitoba do forthwith proceed to hear and determine the application of the said Grace Anne Forlong for administration of the estate of the said Alexander Macdonald, deceased."

This court complied with the said order of the Court of Appeal and has determined the said application, in the exercise of its discretion and powers vested in it in that behalf, by again refusing it. Such refusal is made under the authority of Section 33 of the said Act, which is as follows:

"33. Where a person has died wholly intestate, or leaving a will without having appointed an executor thereof willing and competent to take probate, or where the executor was at the time of the death of such person resident out of Manitoba, and it appears to the court to be necessary or convenient in any such case, as by reason of the insolvency of the estate of the deceased or other special circumstances, to appoint some person to be admin-

istrator of the estate of the deceased or of any part of such estate other than the person who, if this Act had not been passed, would by law have been entitled to a grant, it shall not be obligatory upon the court to grant administration to such last mentioned person, but the court in its discretion may appoint such person as the court thinks fit, upon his giving such security, if any, as the court directs, and every such administration may be limited as the court thinks fit.—R.S.M. c. 41, c. 35."

After this diversion and delay caused by the invocation of the extraordinary mandamus procedure, this court will now proceed with this matter at and from the point where it was interrupted by those abortive proceedings.

As far as is known, or at least as far as the evidence disclosed, on only two occasions did the late Mr. Macdonald formally record his testamentary intentions in writing; the first time in December, 1923, in the document filed as and hereinafter referred to as Exhibit 4, and the second time in September, 1927, in the document filed as and hereinafter referred to as Exhibit 18. The alleged will, Exhibit 1, is not now considered, because it never was in any manner or degree the act and will of the deceased. He died never knowing, never conscious of the fact that he had executed any such document as and for his last will and testament.

Mr. Macdonald took particular pains in the preparation of both Exhibits 4 and 18 in so far as the objects of his bounty and the general disposition of his estate were concerned, and the same general plan of distribution was common to them both. Both of them were prepared by his solicitors, Messrs. Hough, Campbell & Ferguson, who had acted for him in that capacity for many years. Both of them were incomplete in that certain blanks were left to be filled in.

Exhibit 4 was sent by the solicitors to Mr. Macdonald as a "draft form of will . . . for his consideration." It bears a notation to that effect. Nevertheless, Mr. Macdonald filled in the date "26th day of December, 1923," and signed it with his name, "A. Macdonald," in the presence of "A. B. Flett, Witness." "The Manitoba Wills Act" requires two witnesses; otherwise the execution is in accordance with the requirements of the Act.

There can be no doubt Mr. Macdonald signed this document as and for his last will and testament. He did not sign it for fun, or merely for practice in the art of writing his signature. He was a big business executive, signing important documents regularly and fully understanding the significance of attaching his signature to any document. It is evident he thought he was signing his will under the impression that it required only one witness. If he knew of the requirement of two witnesses, he probably thought the second witness an unnecessary legal formality, for he was a man of directness and impatient of formality.

Later Mr. Macdonald found out that his will was irregularly executed and that it required two witnesses to make it valid. He was advised that by several of his old friends and associates, and particularly by his old friend and legal adviser, the late Mr. Isaac

Campbell. He decided to make a new will, but kept on postponing doing so and matters drifted on without it being done.

Finally, after the death of his wife on the 31st day of August, 1927, he seriously directed his attention to the making of a new will. Using Exhibit 4 as a basis for the preparation of the new will, he, in collaboration with Mr. Flett, drew up four foolscap sheets of typewritten instructions, filed as Exhibit 24, and transmitted them, together with Exhibit 4, to his solicitors with instructions to prepare the new will. The result of using Exhibit 4 as a basis for the preparation of the new will is that it bears a number of pencilled notations and obliterations throughout it.

In accordance with their instructions the solicitors prepared the new draft will in duplicate, sent one to Mr. Macdonald and retained the other, Exhibit 18, in their office, together with Exhibit 4. The retention of Exhibit 4 by the solicitors was its salvation. The duplicate of Exhibit 18 sent to Mr. Macdonald has entirely disappeared and is wholly unaccounted for. No evidence was adduced as to what has happened to it. He may have executed it, or he may not. Certainly, he had it prepared to be executed, and equally certain that if he did execute it, this time he would have had two witnesses to it. The total and unaccounted-for disappearance of the duplicate of Exhibit 18, by itself would not be particularly significant, but in conjunction with and in the light of the trail of stealth, fraud and perjury in connection with the alleged will, Exhibit 1, is suspicious and suggestive of wrongdoing in connection with its disappearance. I am satisfied that the will of 1923, Exhibit 4, bearing the signature of Mr. Macdonald, would also have disappeared and be unaccounted for, if it had not been retained in the office of the solicitors, from whose custody it has been produced.

The late Mr. Macdonald was a very successful business man. He was a man of large wealth and also of large heart. Throughout his life he was known for his generous assistance to various charitable institutions, particularly to the Home of the Friendless and the Children's Home of Winnipeg, in which he took a special interest. During his life he made generous provision and endowment for his family, so that the members thereof were independently wealthy in their own right. Because of that fact he did not leave to his children (only two of whom were then surviving) large individual legacies, that is, large in proportion to the size of his estate. In Exhibit 4 he gives a legacy of $100,000.00 to his daughter Grace Anne Forlong, and a similar legacy to his son Duncan Cameron Macdonald. In Exhibit 18 he gives his daughter a legacy of $150,000.00 and his son a similar one. The son Duncan predeceased his father by fifteen days. He died on the 8th of August, 1928, and Mr. Macdonald died on the 23rd day of August, 1928. Duncan Macdonald left an estate probated at $353,902.97, the bulk of which went to his sister Mrs. Forlong. She also inherited a considerable sum from her mother's estate.

Both Exhibits 4 and 18 provide for certain other legacies, particularly to employees of Mr. Macdonald's various businesses.

But the really significant and most characteristic feature of the two documents is "The Macdonald Trust," which is constituted in both of them in the following words:

"I direct my trustees to stand possessed of the balance or residue of my estate to be called "The Macdonald Trust" to invest and reinvest same with power to vary such investments and to pay to my daughter Grace during her natural life one-fourth of the clear income arising therefrom and to my son Duncan during his natural life another one-fourth of such income without in either case power of anticipation and during the lifetime of both Grace and Duncan to pay the remaining two-fourths of such income and on the death of either of them three-fourths of such income and on the death of both of them the whole of such income to such charitable institution or institutions (including hospitals) in or about the City of Winnipeg as my acting trustees for the time being may in their absolute discretion from time to time select, said income to be paid to such institutions if more than one, in such proportions as my said trustees may think proper."

The conclusion is irresistible that Mr. Macdonald wanted his good works to live after him in the Macdonald Trust. That was the project nearest and dearest to his heart and most thoroughly characteristic of him. On the only two occasions we know he formally recorded his testamentary intentions in writing he provided for it in the same specific and definite language.

The late Mr. Macdonald was in his 84th year when he died. He had throughout his long life been noted for vigor of both body and mind. For some time before his death he suffered from a progressive senility of the mind, and also from the progressive ravages of "cancer of the bladder with the usual arterial changes of age." "His acute illness was cancer of the bladder" and was the real cause of his death. As I said in my interim judgment, the evidence convinces me that he did not possess testamentary capacity for some time before his death. As to just what time he ceased to possess it is difficult, if not impossible to determine. But I am absolutely satisfied that at no time during his last illness which the doctor placed from the end of May to his death did he have testamentary capacity. It was during that period that he was got to sign the alleged will, Exhibit 1, as well as a general power of attorney to Alexander Bain Flett, filed as Exhibit 30.

Testamentary capacity is defined and explained in Halsbury's Laws of England, Vol. 28, Section 1047, as follows:

"It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding, words which time out of mind have been held to mean sound disposing mind, and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature; but a will is not revoked by the subsequent insanity of the testator.

"In order to constitute a sound disposing mind a testator must not only be able to understand that he is by his will giving his property to one or

more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from participation in that property. For this purpose it is essential that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which if the mind had been sound would not have been made. Perversion of moral feeling does not constitute unsoundness of mind."

I pass now to more particular consideration of the alleged will, Exhibit 1. The chief role in connection with that infamy is played by John Alexander Forlong, son-in-law of the deceased. It was his conception, and he planned and carried through the various steps in connection with it. His design was to become a direct beneficiary in Mr. Macdonald's estate, something Mr. Macdonald evidently never intended him to be, for he did not include him in that capacity in either of the two wills in which he had formally expressed his testamentary intentions.

Mr. Forlong was not taking any chances on his chance of being in Mr. Macdonald's will. He admits he knew there was a will four or five years old but didn't know its contents, and didn't know what other wills there might be.

By MR. PHILLIPPS—Evidence, Page 523:

"Q.—When did you have your first discussion, if any, with the late Mr. Macdonald in regard to the matter of his will?

A.—This last will?

Q.—Any will.

A.—Well, for the last four or five years, Mr. Phillipps, he has carried around this one here in his pocket, more or less; I have seen it.

. . . . . .

Page 526:

Q.—At any rate there is the document, 26th December, 1923. Then, what you say is that Mr. Flett did tell you that the testator had signed what, a will? A.—Yes.

Q.—A will? A.—Purported to be a will, yes.

Q.—He didn't come along and say it purported to be?

A.—I understood so, it was a will.

Page 528:

Q.—When did you learn what Exhibit 4 contained?

A.—I never knew what it contained."

Q.—You never knew; you have read it since these proceedings started?

A.—I have not.

Q.—You have not? A.—No.

Q.—Never looked at it? A.—No.

Q.—Never been told what is in it? A.—No.

Q.—You do not know today?

A.—I do not know what is in that thing today."

Page 549:

Q.—Of course, you had the will all the time in your possession (referring to Exhibit 1)?

A.—Oh, yes, but there might have been another one.

Q.—There might have been? A.—I didn't know."

Mr. Forlong holds several important business positions, officer of a trust company, a loan company, etc., and yet he was an unintelligent as well as an untruthful witness. He gave some extraordinary evidence in connection with the alleged instructions from Mr. Macdonald in connection with Exhibit 1, and so did Mrs. Forlong. Under Exhibit 1 the estate is left in three equal shares to the three beneficiaries, Duncan Cameron Macdonald, Grace Anne Forlong and John Alexander Forlong. And yet according to the evidence of Mr. and Mrs. Forlong they were not to be absolute beneficiaries but mere TRUSTEES of the estate, indefinite though they express the trust to be. Mrs. Forlong out of her own mouth estops herself from claiming to be the absolute and sole beneficiary of her father's estate, and her husband's evidence is even more emphatic to that end.

Page 530:

"Q.—Now then, coming to the question of the Will, Exhibit 1, will you tell us the circumstances as to how that document came into existence?

A.—This one?

Q.—Yes? A.—Yes.

Q.—Proceed?

A.—Mrs. Forlong telephoned me one morning and told me that her father wanted to see me, he was very anxious to see me, for to come up, so I came up; this was, I would say, about, possibly, a week before he signed it. I came up to the house and talked with him, met my wife and she said, "Father wants to make a will." "A will?" I said, I immediately suggested getting Mr. Ferguson, naturally, and she said, "No, he won't have a lawyer." So we went in and we talked with Mr. Macdonald for some time and Mr. Macdonald said, "You know," he says, "I am tired. There is lots I might want to do but I have left it too late."

Q.—"There is lots" what?

A.—He said, "I am tired." He said, "There is lots I might have wanted to do but I have left it too late."

Q.—He said, "I am tired. There is lots I might have wanted to do but I have left it too late"?

A.—Yes, something along this line, and he said, "I will tell you what I am going to do." He said, "I am going to leave my affairs in Duncan's, Grace's and yourself to carry on and do the best in my interests as you would think." He says, "Just make out some memo"—that is the way he put it, you see. Well, I never drew any wills; however, I went down town and I bought this document,—as you say, costing ten cents,—bought two of them, and took them into the office and I tried to fill them out the best way I could. . . .

Page 534:

Q.—On the first occasion, which we have been told was about the 15th June, what did he tell you about how he wanted his property divided?

A.—He simply stated he was going to leave his estate to his son, his daughter and me to carry on, and as I told you a few minutes ago, to do the best in his interests as our judgment would permit. Something like that.

Q.—Is that all he said? A.—That is all he said, sir.

Q.—You are clear and positive? A.—Absolutely.

Q.—Now, think, and take your time, because I am going to ask you another question. A.—Go ahead.

Q.—Are you clear and positive that is all he said?

A.—I told you a few minutes ago that he said he was tired and there were things he had left too late and he would leave it to us to carry on. I told you that.

Q.—THE WILL, HOWEVER, MAKES NO MENTION OF LEAVING IT FOR THE PURPOSE OF CARRYING ON?

A.—NO, HE MENTIONED THAT VERBALLY.

. . . . . .

Q.—I am not asking you to draw conclusions; I am asking you the specific words he used.

A.—He said, "Leave it to the three of you without any—what shall I say?—

Q.—He didn't say or make use of the expression "in equal shares"?

A.—No, he said leave it to the three of us.

Q.—And he did accompany the expression that he would leave it to the three of you with "to carry on" what?

A.—I told you a few minutes ago, carry on and do in his interests to the best of our judgment, or something along that line, as if he were living.

Q.—That was all the instructions you had?

A.—That is right.

Q.—And from that you prepared this document, dividing it into three equal parts, between yourself, your wife and his son?

A.—That is right.

Page 549:

Q.—You said Mr. Macdonald's instructions to you were he wanted the three of you to carry on, as he, Mr. Macdonald, had carried on in his lifetime?

A.—To do the best in his interests in our judgment, yes, and that is what we intended to do.

. . . . . .

Q.—And when he spoke of carrying on, as he would carry on, did he mention the charities?

A.—He didn't mention anything, to carry on and use our best judgment.

Q.—To carry on, there was nothing to carry on, so far as the corporation was concerned, because the corporation was not going to die anyway?

A.—No.

Q.—That was a mere matter of holding the shares; what was it he was so anxious of carrying on?

A.—I don't know what was in his mind, Mr. Phillipps.

Q.—What was it do you think, that he was urging you to carry on for?

A.—I could not tell you, Mr. Phillipps; that is all he said. He said he was getting tired.

Q.—What about the Macdonald Trust?

A.—What about it? I don't know anything about it.

Q.—You don't know anything about it?

A.—No, sir.

Q.—You never heard of it?

A.—No; I told you that a few minutes ago; I don't know what was in that document."

Page 561:

Q.—Now, yesterday, you made the following statement: You said that Mr. Macdonald said to you, "I am going to leave my affairs in Duncan's, Grace's and yourself to carry on and do the best in my interests as you would think fit."

A.—That is right.

Q.—And I want to draw your attention to other answers that I asked the reporter to give us. You further stated, "he simply said he was going to leave his estate to his son, his daughter and me to carry on, as I told you a few minutes ago, to do the best in his interests as our judgment would permit; something like that."

A.—Something like that; that is correct; I adhere to that.

Q.—And you further made the statement, "I told you a few minutes ago that he said he was tired."

A.—Yes.

Q.—"And there were things he had left too late and he would leave it to us to carry on. I told you that." Do you remember making those answers?

A.—Yes.

Q.—And then you finally said, "I told you a few minutes ago, carry on and do in his interest to the best of our judgment, or somewhat along that line."

A.—That is right.

Q.—"As if he was living."

A.—Yes.

Q.—Now, with those answers before you what did he tell you if anything, was his intentions as to the future so that you would know how to carry out his desires?

A.—He didn't say, Mr. Phillipps.

Q.—Wouldn't you naturally ask him?

A.—No; he just asked us to carry on as I told you there.

Q.—But here was a man of large wealth apparently saying he was going to leave to you and his son and his daughter "to carry on in my interests"; you would have now, wouldn't you naturally have some curiosity to know what were his desires in regard to the future in order that you might carry on according to his wishes?

A.—No, sir.

Q.—You would have no desire as to that; you did not think that the occasion warranted an inquiry from him as to what his desires were for the future?

A.—It was not mentioned.

Q.—I didn't ask you that.

A.—I didn't inquire; is that what you asked me?

Q.—I asked you whether you did not think it was a matter that you would ask him what his desires were as to the future.

A.—No; if he wanted to say anything he would have said it himself.

Q.—Well, Mr. Forlong, you were assuming a very grave responsibility, were you not?

A.—Yes.

Q.—I think we can agree upon that.

A.—Yes, we agree on that.

Q.—And you were receiving unbounded confidence, were you not?

A.—Absolutely.

Q.—And you were accepting a position to carry out the wishes of an old man who felt that he was no longer able to give effect to them himself?

A.—That is right.

Q.—And he was leaving this to you, according to your testimony, to do the best in his interests?

A.—That is right.

Q.—Now, do you tell the court that with that responsibility of the future lying before you, you did not think it was worth while inquiring from him what his personal desires were?

A.—I never mentioned, I never said anything to Mr. Macdonald. Those were his wishes and he carried them out.

Q.—But his wishes were that you should carry on according to his best interests?

A.—Do the best for him as our judgment would suggest.

Q.—Wouldn't you naturally want to know what he wanted to do with his money?

A.—I didn't ask him.

Q.—I didn't ask you whether you asked him; I asked you and I put it to you that being the recipient of that confidence, being told by this old gentleman that he wanted you to carry out his wishes,—now, that is about the size of it, wasn't it?

A.—Carry out, to do the best as our judgment would suggest as it were.

Q.—In his interests?

A.—In his interests.

Q.—Would you not have sufficient curiosity—perhaps I can put it even more than that—wouldn't you consider it a matter of solemn importance to find out what these wishes were?

A.—I left it entirely to him, sir.

Q.—But leaving it to him was no good.

A.—If he wanted anything specifically mentioned he would have said it himself.

Q.—But, Mr. Forlong, the document that you were then signing was only going to be effectual after he could no longer be here to direct his affairs?

A.—Yes.

Q.—Wouldn't you naturally want to know what his desires were in the future?

A.—No.

Q.—You would not?

A.—No; because the three of us could use our own judgment.

Q.—But in his interests?

A.—In his interests.

Q.—Not your interests?

A.—No, not necessarily.

Q.—Not necessarily? Not at all; that is not the point. It was to be the exercise of your judgment in his interests?

A.—Yes.

Page 567:

Q.—That is, you were willing to undertake the administration of that large estate, that large trust, without making one single inquiry as to what his wishes were?

A.—There were three of us.

Q.—Quite so; I am speaking of yourself.

A.—Well, I didn't ask him anything.

Q.—You didn't ask him?

A.—No.

Page 573:

Q.—Well then, going back now for a moment to Mr. Macdonald's bedside, when he was telling you about he was giving you this to carry on and do the best in his interests, just what did you understand by that as to the application of the money that you were going to receive?

A.—To carry on.

Q.—Yes, I know; but to apply it in what way? To your personal use or to his interests?

A.—There was no mention as to what was to be done; we were to do the best we could in his interests, use our best judgment.

Q.—In his interests?

A.—In his interests, yes."

Let us now turn and see what Mrs. Forlong's evidence is in the same connection.

By MR. PHILLIPPS—Page 497:

"Q.—Now, Mrs. Forlong, when did you first have any knowledge, if you did, of the existence of Exhibit 4?

A.—I would not know whether that was the one that was in the house; I never read it.

Q.—Was there one in the house?

A.—Yes, whilst my mother was living.

Page 500:

Q.—When did you have your first conversation with your father in regard to anything to do with Exhibit 1?

A.—Anything to do with it at all, you say?

Q.—Yes.

A.—Well, I was talking to him, well, about,—I guess it was a week before or more, about a week before this was signed.

Q.—About a week before, that is, about a week before, that is the 22nd June, 1928?

A.—Yes.

Q.—Now, will you relate the conversation that took place?

A.—Yes, I will, because he was discussing things and he had been telling me how disappointed he was in certain things and he said he had always meant to do things for different institutions and he said, "I am an old man and I am very tired." And he said, "I haven't done what I should have done." And he said, "I am now going to leave to Duncan—my brother —and yourself and Jack to carry out my wishes and do the best you can."

Q.—Was anybody else present when that conversation took place?

A.—No, but he told me to go in and talk it over with my brother who was in bed.

Q.—And did you do that, Mrs. Forlong?

A.—I did.

Q.—Now, do I understand that he brought that up himself?

A.—He did.

Q.—Altogether?

A.—Altogether.

. . . . . .

Q.—Yes, but did he tell you how he proposed to leave it?

A.—In stated facts, no.

Q.—As I follow your evidence, you say he called you in and he said he was getting old and felt very tired?.

A.—Yes.

Q.—And he was going to leave it to you and Jack—I think he called your husband Jack?

A.—And Duncan.

Q.—And Duncan to do what?

A.—To do our best for his interests.

Q.—IN WHOSE INTERESTS?

A.—IN FATHER'S.

Q.—In father's interests.

A.—As to what father would do use our own judgment.

Page 504:

Q.—Can you remember any words that he used?

A.—Just that he decided he would leave things in that way to the three of us.

Q.—To do what? You know what he wanted?

A.—To use our judgment and do the very best we could.

Q.—YOU WERE TO USE YOUR JUDGMENT IN RESPECT TO WHAT MATTERS?

A.—OH, I SUPPOSE HELPING OUT ALL THE THINGS FATHER HAD ALWAYS HELPED, CHARITIES, AND ALL THE THINGS HE HAD EVER HELPED.

By MR. RICHARDSON—Page 659:

Q.—Your husband has told us your father's instructions in regard to the drawing of Exhibit 1 were something along these lines, that he was old and tired and had left some things undone that he wanted to do and he was turning the matter over to you three to carry on as he would have in his lifetime.

A—Yes.

Q.—Can you recall or will you please now recall as near as you can his exact words in that regard?

A.—Well, it was just along that line; I cannot tell you absolutely word for word, no."

Both these witnesses maue other declarations than those quoted to the same tenor. Repeatedly, they affirm that Mr. Macdonald intended to leave his estate to the three beneficiaries in Exhibit 1, NOT TO THEM ABSOLUTELY, BUT TO THEM AS TRUSTEES, "to carry on in his interests as he would do if he were living." Out of their own mouths they confess Exhibit 1 does not express Mr. Macdonald's intentions in regard to his estate, and that it was not drawn in accordance with the only instructions they aver he gave in connection with it. Even if Exhibit 1 complied with the statutory formalities of execution, and if Mr. Macdonald had possessed testamentary capacity, as its proponents contend, it would be subject to attack as not expressing the declared intentions and instructions of the testator in regard to his estate.

It is not necessary to review in detail the steps in connection with the preparation of Exhibit 1. Mr. Forlong gave Mr. Macdonald's solicitors a wide berth and kept everything as devious and underhand as possible. Mr. Macdonald was got to sign the document on the 22nd June, at least it bears that date, propped up in bed. It had been arranged by telephone for Mr. Wm. A. Irish to come over to witness the execution and he arrived there just as Mrs. Forlong was dipping the pen in the ink to hand to Mr. Macdonald to sign the document. The other witness, Henrietta Isbister, whose name the document bears was not present at all at the signing by Mr. Macdonald. After Mr. Macdonald signed the document Mr. Forlong and Mr. Irish went with it downstairs to the library, and the former called Miss Isbister, who was upstairs, to come down and she was told to sign it and where to put her signature. Miss Isbister swears that the document was folded twice, that she did not see Mr. Macdonald's signature and did not know the document was supposed to be his will. She says she did not see the signature "A. Macdonald" on the document until September, and did not know she was supposed to be a witness to the will until Mrs. Forlong told her so later at their summer home in Kenora, Ontario.

Miss Isbister also swears that she was got to sign an affidavit by Mr. Forlong not knowing what it was. The following is her evidence in that connection:

By MR. COUSLEY—Page 40:

"Q.—Now, I show you another document, part of Exhibit No. 2; whose signature is that, Miss Isbister?

A.—That is my signature.

Q.—That is your signature; do you remember signing this document?

A.—Well, I signed several; I don't know.

Q.—You signed several documents but you don't know; where did you sign several documents?

FORM No. 118—AFFIDAVIT OF EXECUTION OF WILL—(Gen. 2-27) THE WILSON STATIONERY CO. LTD.—70005

In the Surrogate Court of the Eastern Judicial District

Of the Province of Manitoba

In the Estate of Alexander Macdonald the said Deceased

I, Henrietta Isbister of the Town

of Kenora in the Province of Ontario,

Nurse,

make oath and say as follows:

1. That I knew Alexander Macdonald

late of the City of Winnipeg,

in the Province of Manitoba, the said deceased

2. On the 22nd day of June A.D. 19 28

I was personally present and did see the paper writing, now shown to me and marked as Exhibit "A" to this affidavit, signed by the said Alexander Macdonald

as the same now appears, as and for his last will and testament, and the same was so signed by the said Testator

in the presence of me and of William A. Irish

the other subscribing witness thereto, both of us being present at the same time, whereupon the said

William A. Irish and I did

in the presence of the said Testator

attest and subscribe the said Will

3. I verily believe that the Testator Alexander Macdonald

at the time of the execution of the said Will was of sound and perfect mind, memory and understanding

Sworn before me at the Town

of Kenora Ontario

in the Province of ~~Manitoba~~

the 4th day of September,

A.D. 19 28.

Henrietta Isbister

A Notary Public in and for
the Province of Ontario.

NOTE.—If there are erasures or interlineations in the Will a clause should be added referring to them with particularity and showing that they were there at the time of the execution, and if the Testator signed by making his mark or if another signed for him by his direction, it should be shown that the Will was read over to him before execution and that he appeared fully to understand it.

EXHIBIT 7—*False affidavit filed on proof of alleged will in common form. Miss Isbister swears she was got to sign this document not knowing it was an affidavit and that she did not swear any affidavit. The Court accepted her evidence. See evidence and comment in Judgment.*

A.—I signed some in their own home and I signed one at the summer place at Kenora last year.

Q.—You signed one at Kenora?

A.—Yes.

Q.—At whose request?

A.—Mr. Forlong's.

Q.—Can you tell the Court any conversation that you had with Mr. Forlong at this time either before or after you signed this document?

A.—He asked me to sign a paper. I do not remember any conversation just then.

Mr. Phillipps—What document is it?

Mr. Cousley—That is part of Exhibit 2, being an affidavit of execution of will dated 1st of September, 1928.

Q.—Did you know what this document was when you signed it?

A.—No, I did not.

Q.—Was there any explanation as to what the document was given to you?

A.—No.

Q.—Did you sign this document before anybody?

A.—Mr. and Mrs. Forlong.

Q.—Now, this purports to be an affidavit sworn before Earl C. Popham, I think it is, a Notary Public in and for the Province of Ontario?

A.—I do not know that man; I never met him.

Q.—Did you take any affidavit, before Mr. Popham?

A.—No, I did not.

Q.—I will read this document over, Miss Isbister (reads it). Was that affidavit read over to you, Miss Isbister?

A.—No, it was not.

Q.—Had you any idea what you were signing?

A.—I had not.

Q.—Then you say you did not appear before Mr. Popham?

A.—No, I did not.

Q.—And that it was in the presence of Mr. and Mrs. Forlong?

A.—Yes.

Q.—You say that this was at Kenora; at what place in Kenora, Miss Isbister?

A.—Mrs. Forlong's camp.

Q.—And what part of the camp?

A.—In their living room.

Q.—Do you remember what time of day it was?

A.—During the morning sometime or forenoon.

Q.—And Mr. and Mrs. Forlong were there; were there any others present?

A.—No, I do not remember any others."

The affidavit of Henrietta Isbister was detached from Exhibit 2 and marked separately as Exhibit 7. This affidavit purports to be sworn at Kenora on the 1st day of September, 1928, before Earl C. Popham, a notary public, and is under his notarial seal. Mr. Popham swears that Miss Isbister signed and swore this affidavit in his office in Kenora. Miss Isbister swears positively

that she was never in his office, or any office in Kenora, and never swore any affidavit before him, in fact, when confronted with him in court she swore she had never seen him before. Mr. Forlong, of course, swears that he took Miss Isbister into Mr. Popham's office for the purpose of having her swear the affidavit, but I do not believe him, neither do I believe Mr. Popham. I accept Miss Isbister's evidence unreservedly that she was never in Mr. Popham's office and never signed nor swore the affidavit before him.

Mr. Popham's evidence on this point is in part as follows:

By MR. COUSLEY—Page 97:

"Q.—Go on, Mr. Popham?

A.—Mr. Forlong and Miss Isbister came into the office and produced this affidavit and what purported to be a will.

Q.—I show you Exhibit 1; can you identify that as the document?

A.—That is the document, yes. The affidavit was signed in my presence and sworn by me. I then completed the affidavit and sealed it with my notarial seal. I then completed the exhibit stamp and found out then that Miss Isbister also had to sign there. She accordingly signed below the exhibit stamp.

Q.—Exhibit 1?

A.—That is the will.

Q.—Indicating this signature?

A.—Here, yes.

Q.—This also is your signature?

A.—That is my signature.

Q.—And this is your signature on Exhibit 7?

A.—That is correct.

Q.—Was the affidavit read over to Miss Isbister?

A.—I cannot say whether it was read over to her or not; I do not remember that.

By THE COURT:

Q.—Had it been signed before it was brought to you?

A.—No, not at the time it was brought. I remember that from the fact of the unusual procedure in the witness signing below the exhibit stamp which was the first time I had ever seen that procedure followed. I remember the necessity of signing—if my recollection is right, I completed that exhibit stamp before I noticed that and then it had to be signed again.

Q.—That is not really necessary, as you know.

A.—That is as I say it impressed itself upon me because I hadn't seen that before.

By MR. COUSLEY:

Q.—That is your recollection as to Miss Isbister's signature on Exhibit No. 1. Do you recall whether or not her signature was on Exhibit No. 7 when the paper was brought in?

A.—No, I do not think it was. In speaking of the actual minute details, I am giving to the best of my recollection; I cannot swear positively to every detail that happened. It is rather far back for that; I am giving it to you as closely as I can."

One circumstance discrediting Mr. Popham's evidence is that he swore Miss Isbister's and his own signatures were both signed with the same ink in his office, whereas it is quite obvious to the naked eye that the inks are not the same.

Miss Isbister is a duly trained and qualified nurse. She was employed in Mr. Macdonald's household for some twelve years before his death. I believe her to be a truthful woman of good character. She was an employee and did what she was told. In that way she was victimized by Mr. Forlong into signing documents not knowing what she was doing. I do not believe for a moment that she intended to swear falsely; but I do believe that Mr. Forlong intentionally got the false affidavit with her signature in the stealthy way it was done to bolster up the alleged will to deceive this court and accomplish his ends.

The following evidence shows Miss Isbister was careful and cautious in her sworn statements:

Page 77:

"Q.—In this document, Exhibit 7, "I verily believe that the testator Alexander Macdonald at the time of the execution of the said will was of sound and perfect mind, memory and understanding." If you had known that was there, you would not have signed it, would you?

A.—I doubt it.

Q.—It would not have been true, would it?

A.—Not at all times.

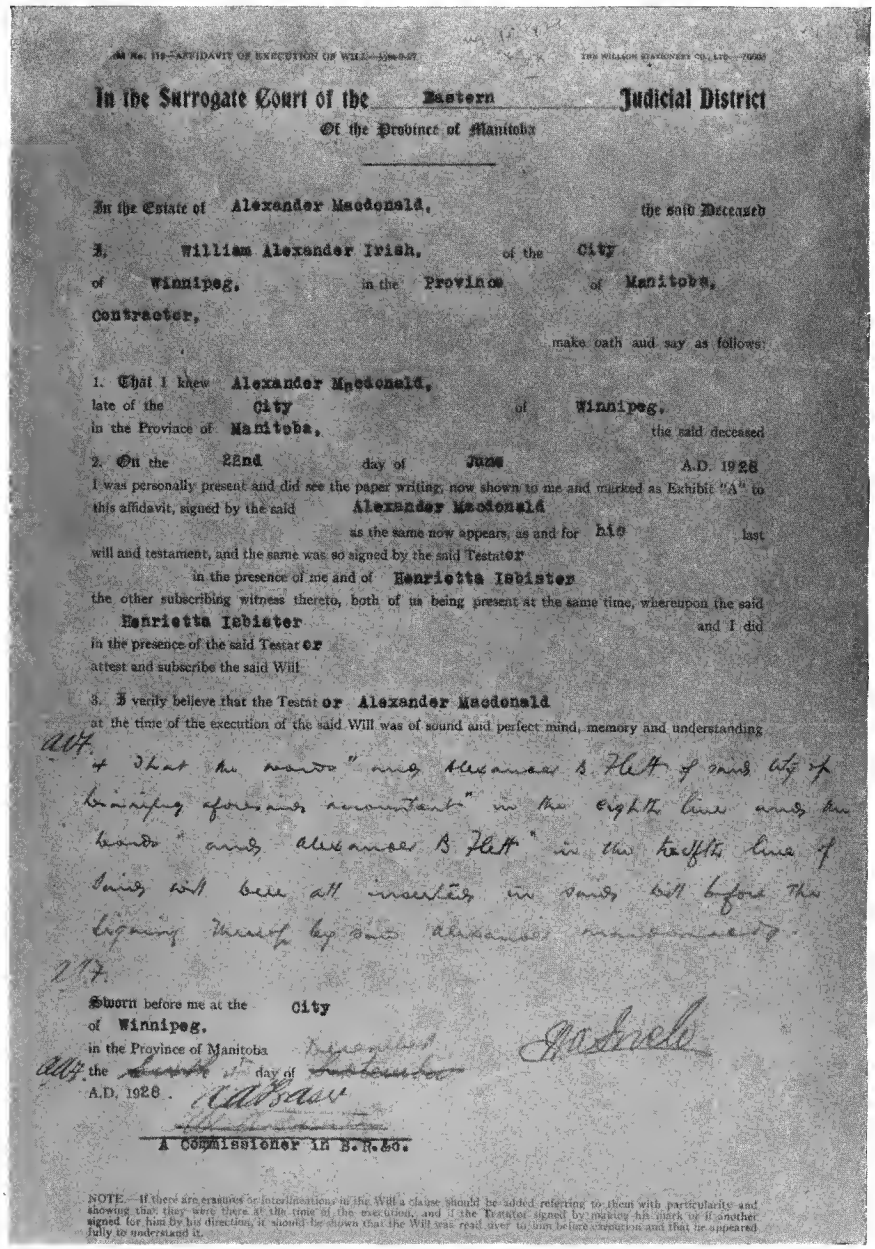
Q.—You would not have sworn to that if you had known it was there, would you?

A.—I doubt it."

Some months afterwards Miss Isbister began to realize how wrong was the part she had been made to play in connection with Mr. Macdonald's alleged will and she was worried by it. Finally, it was too much for her and she shared her worries with others. In that way the invalidity of the alleged will became known. On responsible representations being made to this court in that behalf, the court immediately revoked the probate of the alleged will which by that time had been granted. Thus only were the evil designs of Mr. Forlong foiled, by the pangs of conscience of a woman whom he had victimized in their perpetration. That is all that stood between him and their successful culmination so nearly achieved.

The affidavit of the other witness, William Arthur Irish, filed as Exhibit 8, is just as bad, except that I believe he knew what he was doing, whereas Miss Isbister did not. In it he falsely swears, as follows:

"2. On the 22nd day of June A.D. 1928 I was personally present and did see the paper writing, now shown to me and marked as Exhibit "A" to this affidavit, signed by the said Alexander Macdonald as the same now appears, as and for his last will and testament, and the same was so signed by the said Testator in the presence of me and of Henrietta Isbister, the other



In the Surrogate Court of the Eastern Judicial District
Of the Province of Manitoba

In the Estate of Alexander Macdonald, the said Deceased

I, William Alexander Irish, of the City of Winnipeg, in the Province of Manitoba, Contractor, make oath and say as follows:

1. That I knew Alexander Macdonald, late of the City of Winnipeg, in the Province of Manitoba, the said deceased

2. On the 22nd day of June A.D. 1928 I was personally present and did see the paper writing, now shown to me and marked as Exhibit "A" to this affidavit, signed by the said Alexander Macdonald as the same now appears, as and for his last will and testament, and the same was so signed by the said Testator in the presence of me and of Henrietta Isbister the other subscribing witness thereto, both of us being present at the same time, whereupon the said Henrietta Isbister and I did in the presence of the said Testator attest and subscribe the said Will

3. I verily believe that the Testator Alexander Macdonald at the time of the execution of the said Will was of sound and perfect mind, memory and understanding

A07. 4. That the words "and Alexander B. Hall of said City of Winnipeg aforesaid accountant" in the eighth line and the words "and Alexander B. Hall" in the twelfth line of said will were all inserted in said will before the signing thereof by said Alexander Macdonald.

A07.

Sworn before me at the City of Winnipeg, in the Province of Manitoba the A07. day of December A.D. 1928.

A Commissioner in B.R.&c.

NOTE.—If there are erasures or interlineations in the Will a clause should be added referring to them with particularity and showing that they were there at the time of the execution, and if the Testator signed by making his mark or if another signed for him by his direction, it should be shown that the Will was read over to him before execution and that he appeared fully to understand it.

EXHIBIT 8—*False affidavit filed on proof of alleged will in common form. This affidavit was sworn and resworn. See evidence and comment in Judgment.*

subscribing witness thereto, both of us being present at the same time, whereupon the said Henrietta Isbister and I did in the presence of the said Testator attest and subscribe the said will."

As a matter of fact Mr. Irish swore his affidavit twice. Some words in the writing in the will appeared to be in different ink as if they were added after the others. The executors are named twice as follows: "Duncan Cameron Macdonald of Winnipeg in the Province of Manitoba, Merchant, John Crawford of Moose Jaw in the Province of Saskatchewan, Merchant, and my son-in-law, John Alexander Forlong of the City of Winnipeg, aforesaid, Company Manager, and Alexander B. Flett of said City of Winnipeg aforesaid, Accountant"; and again "Donald Cameron Macdonald, John Crawford and John Alexander Forlong and Alexander B. Flett." The words "and Alexander B. Flett of said City of Winnipeg aforesaid, Accountant," and "and Alexander B. Flett" are obviously not in the same ink as the others and the use of the double conjunction "and" indicates that they were added to the others as an afterthought. The witness Mrs. Farrell who filled in the document from the first draft made by Mr. Forlong says she overlooked the words in question when filling in the form and that on comparing her draft with Mr. Forlong's she discovered their omission and added them. I do not accept her explanation. I have formed the impression that the intention was to have only three executors, and that after Duncan Macdonald's death the name of Flett was added to make up the quota of executors. On considering the application for probate the court requisitioned an affidavit of plight. The requisition was complied with by inserting an additional clause in Mr. Irish's affidavit, as follows: "4. That the words 'and Alexander B. Flett of said City of Winnipeg aforesaid, Accountant' in the eighth line and the words 'and Alexander B. Flett' in the twelfth line of said will were all inserted in said will before the signing thereof by said Alexander Macdonald," and the affidavit was then resworn. The affidavit was sworn the first time before Mrs. W. O. Farrell, an employee in Mr. Forlong's office; it was resworn before Mr. A. A. Fraser in the solicitor's office.

It is not necessary for me to comment much further on the evidence in this matter. The salient feature of the case in so far as Mr. Macdonald is concerned is that he retained his lifelong charitable intentions to the end, retained them even throughout his mental and physical infirmities when his natural faculties were not functioning properly. If there is any truth in the evidence of Mr. and Mrs. Forlong, and they at least are estopped and cannot deny its truth, those intentions were his chief concern in turning over his estate as he is alleged to have done in Exhibit 1, which, as against the beneficiaries therein, on their own evidence, ought to be construed as a TRUST DEED and not as a will. According to Mr. Forlong's evidence the deceased never really gave him instructions for a will. He was told, he says, "JUST MAKE OUT SOME MEMO," and the memo was to be for the carrying on of the estate

after Mr. Macdonald's death in his (Mr. Macdonald's) interests. That is reiterated throughout the evidence.

It was alleged and sought to be proved that Mr. Macdonald towards the end of his life changed his mind and abandoned his charitable intentions. He certainly possessed them as steadfastly as ever in September, 1927, when he had Exhibit 18 prepared after his wife's death, in which he made numerous bequests and finally again constituted The Macdonald Trust. That was only eleven months before his death. And certainly according to the evidence of Mr. and Mrs. Forlong his obsession during his last illness was that matters should be carried on after his death "in his interests as they were in his lifetime," which Mrs. Forlong says (page 505) she supposed meant "HELPING OUT ALL THE THINGS FATHER HAD ALWAYS HELPED, CHARITIES, AND ALL THE THINGS HE HAD EVER HELPED." Is that change of mind an abandonment of charitable intentions?

In my interim judgment, I stated that the special and exceptional circumstances of this case warranted and justified resort being had to the Legislature for a special enactment to validate the will of 1923, Exhibit 4, that being the only body in the Province with authority to do it. I am more convinced than ever of the propriety and righteousness of that course of action. Mrs. Forlong is the only heiress-at-law, being the sole surviving child of the deceased. He made generous provision for her in his lifetime and she has also received large inheritances indirectly from him through her mother and her brother. Out of her own mouth she shows that her father never intended her to become an absolute beneficiary of his estate but a trustee to carry on in his interests. She thereby effectually estops herself from claiming the estate in her own right. And Mr. Macdonald's "interests," as Mrs. Forlong calls them, would undoubtedly be safer and more faithfully carried out in the proper legal constitution of the Macdonald Trust. By so doing Mr. Macdonald's good works would be perpetuated after him, as he always wanted and intended them to be, and his memory would be blessed and respected for ever, as it deserves to be.

Our Legislature has on a number of occasions passed special acts dealing with wills, construing wills, conferring special powers upon executors and administrators and so on, and on one occasion has actually regularized and validated a will irregular and invalid for the same reason as the 1923 will of Mr. Macdonald. By Chapter 115 of the 1926 Statutes of Manitoba, the will of one Johann Johnson, deceased, invalid by reason of there being only one witness, was validated and declared to be legal as a will as if it complied in all respects with the statutory requirements. The beneficiary under that will was the University of Iceland. What the Legislature can do in a poor man's estate for the University of Iceland it can well do in a rich man's estate for the charities in Winnipeg, especially in view of the facts and circumstances disclosed and established in this case. I recommend to those interested an application to the Legislature for a special enactment

validating Exhibit 4 as the legal will of the late Alexander Macdonald, deceased.

There is much further cogent comment that could be made on the evidence, but enough has been said. The evidence as a whole discloses one of the most infamous will transactions that has ever been detected and stalked out into the light of day, in which John Alexander Forlong plays the chief role. I direct the attention of the Crown authorities to the evidence and documents in this case, and recommend for their consideration the institution of criminal proceedings against him for fraud, perjury and subornation of perjury; I also recommend for their consideration the institution of a charge of perjury against William Arthur Irish.

With regard to the application of Grace Anne Forlong for administration of this estate, in the light of the facts and circumstances of the case, I would be recreant to my trust as judge of this court to grant it. The wrongdoing in this case disentitles both her and her husband from ever being placed in any position of trust and responsibility in connection with this estate.

With regard to the costs of these proceedings, I allow all parties their costs, except the executors and Mrs. Forlong, and order them to be paid by John Alexander Forlong and Grace Anne Forlong forthwith after taxation thereof.

In conclusion, I deem it my duty to record my opinion that from and after the institution of these proceedings until their determination and disposition in this judgment, no other court of any jurisdiction has any right to adjudicate upon any matters and causes testamentary in this estate, which "means and includes all matters and causes relating to the grant and revocation of probate of wills or letters of administration," all such being during the pendency of these proceedings SUB JUDICE IN THIS COURT.

(Sgd.) L. ST. G. STUBBS,

Surrogate Court Judge.

Dated this 24th day of January, 1930.

The following is the full text of a letter written by Judge Stubbs to the Manitoba Free Press and the Winnipeg Tribune, with the request for publication. It was published in a censored and excised form in the afternoon editions of both papers on Monday, February 3, 1930:

Winnipeg, Man.,
February 1st, 1930.

The Editor,
"Manitoba Free Press," City.

Dear Sir:

Re Estate of Alexander Macdonald, Deceased.

Elbert Hubbard used to say, "Never explain; your friends don't need it; and your enemies won't believe you, anyway." That is sound enough philosophy, perhaps, in private affairs. But there are certain things which demand public explanation. One of them is how the affairs of this estate have been dealt with in the Courts of this Province.

On the 24th ult. I delivered my final judgment in the Inquiry into "all matters and causes testamentary" in this estate which I have been conducting. That Inquiry exposes a mess of fraud and perjury. STRENUOUS EFFORTS HAVE BEEN AND ARE BEING MADE TO STIFLE PUBLICITY AND PROTECT WRONGDOING. President Hoover said recently, "No believer in democracy questions the sureness of public judgment if the public is given the truth." I subscribe to that proposition. But the rub is the public seldom gets the truth. It gets mostly censored and doctored truth. I am determined that the public shall have the truth, the whole truth, and nothing but the truth in this matter, if at all possible.

This is the state of affairs: AUTHORITY AND THE POWER OF WEALTH HAVE COMBINED TO SUPPRESS AND SILENCE ME; TO RENDER ME IMPOTENT IN MY OWN JURISDICTION; TO VIOLATE THE RIGHTS OF MY COURT. Every fibre of my being revolts and protests to the point of sacrifice of office, if need be. Although I am a pacifist, I am no Tolstoyan. There are times when one has to fight, even though he be a judge. This for me is one. If I must die officially, let it be out in the open, under the clear sky of truth, as I see it, in noble, honorable battle, fighting for what I conceive to be right and just.

The evidence before me shows that John Alexander Forlong and Grace Anne Forlong came into my court with unclean hands. In consequence, in the exercise of my rightful judicial discretion, I refused to give Grace Anne Forlong administration of this estate. Some months ago I was served with a written ultimatum by her solicitors demanding that I grant her administration within a

stated period, failing which an application would be made for a mandamus to compel me.

In due course, Mr. Justice Donovan made a mandamus order directing me to grant Grace Anne Forlong administration of this estate within eight days after service of the order upon me. He made an order beyond the competence of any judge to make, as I show in my judgment. I appealed from that order to the Court of Appeal and it was set aside. The Court of Appeal in its stead ordered and directed me to hear and determine the application of Grace Anne Forlong for administration in this estate. That I have been doing for the last nine months. As a part of the larger whole involved in the hearing and determination of all causes and matters testamentary in this estate, I have been persistently refusing to grant administration to Grace Anne Forlong in this estate.

On the 16th ult. I was served with the order of the Court of Appeal. On the 18th ult. I recorded my refusal. On the 20th ult. notice of intention to appeal therefrom was given. On the 22nd ult. the Court of Appeal on a special EX PARTE appointment and hearing lasting only a few minutes adjudged that letters of administration be granted to Grace Anne Forlong and ordered the Clerk of the Surrogate Court to forthwith issue them to her. And it was done.

This precipitate application to the Court of Appeal was calculated to head-off and nullify my final judgment, which was known to be in course of preparation and almost ready for delivery. On the 17th ult. I personally notified Mr. A. C. Ferguson, K.C., solicitor for the estate, in my chambers, that my final, written, reasoned judgment on the whole Inquiry would be ready and delivered not later than one week from that date. The application to the Court of Appeal was made without any intimation to me; with no notice to Mr. H. A. Bergman, K.C., who has been acting for me and the Surrogate Court in the above legal controversies; with no notice to any of the parties who were before me in the Inquiry: Mr. G. L. Cousley, representing the King's Proctor and the Attorney-General; Mr. B. V. Richardson, representing Mr. H. H. Cooper et al, and Mr. Hugh Phillipps, K.C., appointed to assist the court and represent the charitable institutions, all of whom had a right to be present and to be heard.

The Court of Appeal adjudicated the matter without the evidence before them; without the record of the case, which comprises nearly one thousand pages. They revised my discretion and reversed my decision without even knowing the reasons and considerations upon which I acted. The first elements for a judicial determination were lacking.

One instance to illustrate the absence of any due consideration. The statute requires a bond from the applicant in every grant of administration with one or more sureties in double the value of the estate. This bond is given to the judge of the Surrogate Court. The surety on the bond filed in this case is a bond-

ing company. The bond is for Four Million Dollars. I would not take this company's bond for Forty Thousand Dollars. According to the Canadian Government 1929 Insurance Blue Book, the total authorized capital of the company is only One Million Dollars, and it does not possess surplus assets over liabilities and subscribed capital of Three Hundred Thousand Dollars. A surety ought to justify on oath that he is worth the amount of his bond, all his debts being first paid, and also over and above all statutory and legal exemptions and every other sum for which he is surety. There is no oath of justification. And yet I must take this bond which is given to me personally as judge of the court for Four Million Dollars. I would not take any bond from any company in the City for that amount. I would require four bonds at least for a Million Dollars each from four of the best companies doing business in the City of Winnipeg.

Unfortunately, I stayed at home on the morning of the 22nd ult. in seclusion working on my judgment. I was stunned when informed after 2 P.M. on going to the Court House to keep my 2.30 appointment that the letters of administration had been issued that morning on order of the Court of Appeal. The solicitor for the applicant took the order and literally stood over the Clerk of the Court until the letters of administration were prepared and placed in his hands. Had my clerk only phoned me what was being done, I would have gone post haste to the Court House and before the letters of administration were delivered made this notation on their face: "Issued by the Clerk of this Court under Order of the Court of Appeal without my fiat. L. St. G. Stubbs, J." Every grant of probate or administration requires the judge's fiat. This is the first one in the history of the court that has ever issued without it. Thus, in this fashion were the letters of administration got out of the Surrogate Court. THUS IT WAS EXPECTED TO WRITE "FINIS" IN THIS INFAMOUS CASE.

In due course, in order that the full facts and circumstances of this case may be understood and that the public may know how the charities of the Winnipeg District have been done out of "The Macdonald Trust," I shall write and publish a history of "The Macdonald Will Case," which will be authenticated with the documents and evidence in the case.

In the meantime, I DEMAND AN INVESTIGATION INTO THE WHOLE MATTER BY A COMMITTEE OF THE LEGISLATURE, NOW IN SESSION. I prefer to have a Committee of the Legislature rather than a Royal Commission. There would be more opportunity to get at the facts and evidence of the case.

Yours faithfully,

L. ST. G. STUBBS,
Surrogate Court Judge.